

BEFORE THE MISSISSIPPI ETHICS COMMISSION

TAYLOR VANCE

COMPLAINANT

VS.

PUBLIC RECORDS CASE NO. R-22-038

ITAWAMBA COMMUNITY COLLEGE

RESPONDENT

FINAL ORDER

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Taylor Vance against Itawamba Community College (the “college” or “ICC”). The college filed a response by and through its attorney. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. A Preliminary Report and Recommendation was issued in this matter on April 7, 2023. The respondent did not object to the Preliminary Report and Recommendation and has thereby waived a right to a hearing on the merits. This Final Order is entered in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission.

I. FINDINGS OF FACT

1.1 Taylor Vance alleges that Itawamba Community College violated the Public Records Act by charging a \$25 deposit fee. Specifically, on November 3, 2021, Mr. Vance requested documents “showing how much Itawamba Community College has paid Mike Hurst for legal and consulting fees.” On November 4, 2021, Mr. Vance was directed to the college’s Public Records Access Policy. On June 3, 2022, Mr. Vance sent a public records request for the same documents with a \$25.00 check, for the required deposit fee. On June 23, 2022, Mr. Vance received a written denial from the college stating that there were no records responsive to his request.

1.2 Mr. Vance argues that “requiring a deposit fee to process records flies in the face of the spirit of public access to government documents, especially since no records were found to be responsive to my request.” He states that “ICC has no legal right to ask a requester for a deposit fee, even before they conduct a preliminary search for responsive records” and asks that ICC be prohibited from requiring deposit fees and refund the \$25 deposit fee.

1.3 In response, ICC simply points to its Board Policy BE, ICC’s Public Record Access Policy. This policy states in pertinent part:

7. All requests shall be accompanied by a cost deposit of \$25.00, and requests shall not be processed until that deposit is paid, nor shall the request be deemed to have been received until the deposit is paid. The actual expense to the Community College District of complying with the request, in accordance with the schedule in the following section, shall be charged to the deposit. Reproductions shall not be made if the cost thereof would exceed the deposit, until the deposit is adequately supplemented.

8. The cost of reproducing documents having legal size or smaller pages shall be \$.50 per page, and the cost of producing documents having larger size pages shall be \$1.00 per page. The cost of searching for and locating the material shall be \$2.50 per quarter hour, with a minimum charge of \$5.00. The cost of review by the President, or his/her designee, shall be \$5.00 per quarter hour. If the documentary material is mailed to the requesting party, the actual cost of necessary postage shall also be charged.

II. CONCLUSIONS OF LAW

2.1 The Mississippi Public Records Act of 1983 (the “Act”), codified at Section 25-61-1, et seq., Miss. Code of 1972, provides that public records shall be available for inspection by any person unless otherwise provided by law and places a duty upon public bodies to provide access to such records. Section 25-61-2 and Section 25-61-5. “Public records” are defined as all documents or records “having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body.” Section 25-61-3(b).

2.2 The establishment of fees by a public body to reimburse it for searching, reviewing, duplicating and mailing documents responsive to public records requests is explicitly authorized by the Act. A public body “may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing and/or duplicating and, if applicable, mailing copies of public records.” Section 25-61-7(1). “Any staff time or contractual services included in actual cost shall be at the pay scale of the lowest level employee or contractor competent to respond to the request.” *Id.* “Such fees shall be collected by the public body in advance of complying with the request.” *Id.* This pre-payment, when based upon a reasonable estimate of the actual cost, is a deposit, and any unused deposit must be refunded to the requestor. See Comment 8.4(1), [Mississippi Model Public Records Rules](#).

2.3 However, a public body may never charge more than the “actual cost” of providing access to public records. Section 25-61-7. “[A] public body should provide a *reasonable* estimate of the time and costs it will take to fully respond to the request.... To provide a ‘reasonable’ estimate, a public body should not use the same estimate for every request.” Comment 4.3(6), Mississippi Model Public Records Rules (emphasis added). Any attempt by a public body to impose fees exceeding actual costs reasonably incurred constitutes a willful and knowing denial of access to public records that warrants the imposition of a civil penalty and the award of attorney fees and costs against the public official charging the excessive cost. Harrison County Development Commission v. Kinney, 920 So.2d 497, 503 (Miss. App. 2006). The same can be said for an estimate that is so high that it does not reasonably reflect the actual costs the public body expects to incur in responding to a records request.

2.4 Based on the record before the Ethics Commission, the \$25.00 deposit required by ICC is not reasonably calculated to reimburse it for the actual costs incurred for search, review, duplication and/or mailing of public records and violates the Public Records Act. Moreover, the Board Policies adopted by ICC and quoted above are patently inconsistent with the Public Records Act and must be changed. In addition to the illegal deposit portion of the policy, the duplication and labor costs are also inconsistent with the Act.

2.5 The Ethics Commission has repeatedly held that copy charges of \$0.50 per page exceed the actual cost of photocopying in violation of Section 25-6-7, unless the public body provides proof of the elevated cost or can rely on a statute allowing additional charges. See, for example, Public Records Cases No. R-16-007 and R-17-023 involving copy charges of \$0.50 per page. Under normal circumstances, public bodies should charge no more than \$0.15 per page for duplication, as explained in the Comments to Rule 8, Mississippi Model Public Records Rules.

2.6 As noted above, labor charges “shall be at the pay scale of the lowest level employee or contractor competent to respond to the request.” Section 25-61-7(1). The actual pay scale involved in any particular search for public records may be lower or higher than those charges specified in the ICC Board Policy quoted above. Consequently, following that policy as written will sometimes lead to charges which violate Section 25-61-7(1).

2.7 Furthermore, when a public body denies a request for public records, as in this case, because it did not find any responsive documents, it cannot retain the deposit and must refund any pre-payment to the requestor. Specifically, Section 25-6-7 of the Public Records Act allows for the collection of fees for “searching, reviewing and/or duplicating and, if applicable, mailing copies *of public records*.” (emphasis added). As such, if no responsive public records exist, no fees may be collected or retained. It may be that a public body spends some modest amount of time and effort to confirm that there are no responsive records, but when no records are produced, a public body cannot demand reimbursement for this time and effort.

2.8 Pursuant to Section 25-61-15 of the Act, “[a]ny person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars (\$100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding.” Since this is the first time the Ethics Commission has found Itawamba Community College to have violated the Public Records Act no civil penalty is recommended in this case.

III. CONCLUSION

WHEREFORE, it is hereby ordered as follows:

3.1 The Ethics Commission finds that Itawamba Community College violated Section 25-61-7 of the Mississippi Public Records Act by adopting a policy that requires a requestor to prepay a \$25.00 deposit prior to producing public records.

3.2 The Ethics Commission finds that Itawamba Community College violated Section 25-61-7 of the Mississippi Public Records Act by retaining the requestor’s \$25.00 deposit for his public records request, upon denying his request because there were no responsive documents.

3.3 The Ethics Commission orders Itawamba Community College to refund Taylor Vance the \$25.00 deposit he submitted for his June 23, 2022 public records request.

3.4 The Ethics Commission orders Itawamba Community College to rescind the portion of its public records policies quoted above and adopt in its place Rule 8 of the Mississippi Model Public Records Rules, including alterations conforming with the Comments to Rule 8.

3.5 The Ethics Commission orders Itawamba Community College, through its officials and employees, to strictly comply with the Public Records Act, and find that further violations may result in the imposition of penalties, including payment of reasonable costs incurred by the person seeking public records.

SO ORDERED, this the 8th day of May 2023.

MISSISSIPPI ETHICS COMMISSION

BY: _____
TOM HOOD, Executive Director